Jurisdictional Statement

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81-292

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

No. ____

Dora Lillian Russum ..... *Appellant*

V.

Estate of John R. Russum, Sr. ..... *Appellee*

ON APPEAL FROM THE
SUPREME COURT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED BY THIS APPEAL

The following questions are presented in this appeal:

1. Does a state statute or a judicial interpretation of a state statute, which permits a trial judge, on his own motion, or on motion of the Plaintiff, after default by the defendant and taking of proof in a divorce action, to strike the grounds for divorce as averred in the complaint and insert a new and substituted ground, and thereafter enter a decree of divorce based upon the new ground without affording defendant notice of the amendment or an opportunity to be heard, violate the due process clause of the Fifth (5th) and Fourteenth (14th) Amendments to the United States Constitution?

2. Does a state statute, or a judicial interpretation of a state statute which permits a Plaintiff to serve a resident defendant by publication, without the appointment of an attorney ad litem or mailing notice to her last known address, and where there was uncontroverted proof that Plaintiff knew the whereabouts of defendant within the state during the period of publication, violate the due process clause of the Fifth (5th) and Fourteenth (14th) Amendments to the United States Constitution.

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THE OPINION BELOW

The one word decision of the Supreme Court of Mississippi, affirming the trial Court and denying Appellant's petition for rehearing, is reported at 397 So.2d, 73 (Miss. 1981). No other written opinions have been delivered. That opinion is attached as an appendix.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

(I) This case involves a petition to set aside a decree of divorce, granted in the Chancery Court of Rankin County

Mississippi, on February 26, 1964. The divorce decree as granted after service of process by publication and default by defendant. No attorney ad litem was appointed and notice was not mailed to defendant's last known address.

In her petition to set aside the decree, appellant argued that at the time her former husband filed for divorce, they were both residents and domiciliaries of Mississippi, and that she was never notified of the action, even though she and John Russum were in frequent contact with each other by telephone, before and during the pendency of the action. Appellant contended that Section 1852, Mississippi code, 1942, which was interpreted to allow service by publication only on a domiciliary whose address Plaintiff knew, or with a reasonably diligent search should have known is repugnant to the due process guarantee of the Fifth and Fourteenth Amendments to the U.S. Constitution.

The decision of the Mississippi Supreme Court was in favor of the validity of Section 1852.

Appellant also contended that sections 1304, 1305 and 2735, Mississippi Code of 1942, which were interpreted to allow substitution of the cause of action pleaded, after default and the taking of evidence, without giving defendant notice and an opportunity to be heard, are repugnant to the due process guarantees of the Fifth and Fourteenth Amendments. The decision of the Supreme Court of Mississippi was in favor of the validity of substitution in light of Sections 1304, 1305 and 2735 of Mississippi Code, 1942.

(II) The judgment or decree sought to be reviewed is the ruling of the Mississippi Supreme Court, denying Appellants petition for rehearing. That ruling was issued May 6, 1981, and left standing the Order of that Court dated

March 21, 1981, affirming the trial Court. Notice of Appeal to this Court was filed in the Mississippi Supreme Court, the Court possessed of the record herein, on May 8, 1981. No extension of time to docket this appeal in this Court has been requested or granted.

(III) Jurisdiction of this appeal is conferred on this Court by Title 28, U.S.C.A. Section 1257 (1); In the alternative, jurisdiction to grant Certiorari is conferred by title 28 U.S.C.A. Section 1257 (3).

(IV) Cases sustaining the jurisdiction of this Court are:

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

Griffin v. Griffin, 327 U.S. 220, 66 S.Ct. 556, 90 L.Ed. ____ (1946).

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Wuchter v. Pizzutti, 276 U.S. 13, 48 S.Ct. 258, 72 L.Ed. 446 (1928).

(V) Sections 1852, 1304, 1305 and 2735 of Mississippi Code of 1942 are here involved. The full text of these sections are as follows:

§1304 Mississippi Code 1942

When bill amended without leave.

The complainant may amend his bill as of course, without applying to the court, at any time

before the defendant has made defense, upon complainant paying the costs of furnishing a copy of the amendment to such of the defendants as have taken out copies of the original bill, and of notice of the amendment to be served on all of the defendants. In all other cases, amendments can be made only by leave of the court, or the chancellor in vacation, and upon such terms as the court or chancellor may impose.

§1305 Mississippi Code 1942

Amendments to bills and notice to defendant—answer.

When a bill or petition is amended in vacation, after answer filed, and an answer to the amendment be necessary, the defendant shall be allowed thirty days, after service of notice of the amendment, to answer; but if the amendment be made in term time, the answer thereto shall be filed within such reasonable time as the court may allow or require, failing in which the matter of the amendment may be taken as confessed. The provisions of this section shall apply to matter brought in by supplemental bill or petition as well as to amendments. If the defendant or his solicitor be present in court when the amendment is made, or the supplement filed, other or formal notice shall not be required, and except as to new parties it shall not be necessary to serve any new summons on such amendment or supplement but a written notice personally delivered, or properly addressed and mailed postage fully prepaid to the solicitor of record of the party to be affected or to the party himself, shall be sufficient, provided that a copy of said notice, with a certificate by the solicitor who gave the said notice showing the facts of service or mailing be filed among the papers.

§1852 Mississippi Code 1942.

Summons by publication for nonresident or absent defendant.

If the defendant in any proceeding in a chancery court be shown by sworn bill or petition, or by a filed affidavit, to be a nonresident of this state, or not to be found therein on diligent inquiry and the post office of such defendant be stated in the bill, petition or affidavit, or if it be stated in such sworn bill or petition that the post office of the defendant is not known to the comlainant or petitioner after diligent inquiry, or if the affidavit be made by another for the complainant or petitioner, that such post office is unknown to the affiant after diligent inquiry and he believes it is unknown to the complainant or petitioner after diligent inquiry by the complaint or petitioner, the clerk, upon filing of the bill or petition, account or other commencement of a proceeding, shall promptly prepare and publish a summons to the defendant to appear and defend the suit, on a rule day in vacation sufficiently distant in time to admit of the due publication thereof, or on the first day of the next regular term if thereby the answer of the defendant would be the earlier required, or on the day, and at the time and the place, in vacation set by special order of the court or chancellor for the trial of said bill or petition, account cause, or other proceedings. The summons shall be substantially in the following form, to wit: . . .

The publication of said summons shall be made once in each week during three successive weeks in a public newspaper of the county in which the bill or petition, account, cause, or other proceeding is pending . . .

Upon proof of the prescribed publication of such summons and of the mailing of a copy of the

summons to the defendant at his post office where that is stated, the defendant may be thereupon proceeded against as if he had been served personally for five days, previous to the date of the completion of said publication, with a summons in this case in this state. Where the post office address of a defendant is given, the street address, if any, shall also be stated unless the bill, petition, or affidavit above mentioned, aver that after diligent search and inquiry said street address cannot be ascertained.

Section 2735 Mississippi Code, 1942.

Causes for divorce.

Divorces from the bonds of matrimony may be decreed to injured party for any one or more of the following twelve causes, viz: . . .

Fifth. Habitual drunkenness. . . .

Seventh. Habitual cruel and inhuman treatment.

STATEMENT OF THE FACTS OF THE CASE

This case involves a complaint for divorce by a party who, only days before, had separated from his wife, and the subsequent use of newspaper publication only as the means by which to serve Notice of the Divorce proceedings upon his wife. At the time the pleadings were filed and notice published, the plaintiff was well aware of the whereabouts of the Respondent, and knew that she was both domiciled and present in the same State and within miles of where he resided.

On December 6, 1963, Dora Lillian Russum separated from her husband of four and a half years, John Robert Russum. After leaving their marital abode, Appellant went to live with relatives in Yazoo County, Mississippi, where she lived until December 25, 1963; thereafter she went to Warren County Mississippi. From the date of their separation until well through the date when the Decree of Divorce was entered, Appellant communicated from time to time with Appellee by telephone or in person.

Shortly after the separation of the parties, John Russum consulted his attorney concerning procedings for divorce, and on December 27, 1963, two days after Appellee had spoken with Appellant by phone from her father's home in Yazoo County, Appellee filed his Bill of Complaint for Divorce, alleging under oath that Appellant was a non-resident of the State of Mississippi and that her whereabouts were unknown to Appellee. Appellee alleged the habitual cruel and inhumane treatment of Appellee by appellant, as ground for divorce in his original Bill of Complaint, and prayed for a divorce on that ground.

No personal service of these procedings was made on Appellant, but from January 2, through January 16th, 1964,

notice of the procedings for divorce was published in the Rankin County News, published in Brandon, Mississippi. Appellant neither read of nor heard of the divorce procedings, nor were the procedings ever mentioned to her in her conversations with Appellee. She neither answered nor appeared in person. No attorney ad litem was appointed. A hearing on Appellee's Complaint for Divorce was held before the Chancery Court of Rankin County, Honorable L. B. Porter presiding, on February 26, 1964, after which, on advise of the Court, Appellee was permitted to Amend his Bill of Complaint to allege a separate and distinct ground for divorce. Appellant herein was given no notice of the amendment. Thereafter, on the same day, a final Decree granted all marital property and custody of the children of the parties to Appellee. In late 1978, the Appellant attended Appellee's funeral, and learned of the divorce procedings and the Decree entered therein. On October 24, 1979, Appellant filed petition in Rankin County Chancery Court to set aside the Decree.

Appellant alleged as grounds to set aside the Decree that (1) the judgment was based upon jurisdiction over the parties which was procured by Appellee's Fraud upon the Court and (2) that the Amended Bill of Complaint for Divorce was without due process and that judgment on the Amended compiaint was void as without jurisdiction, since Appellant was not accorded any legal notice thereof.

On March 31, 1980, the Chancery Court, Honorable Billy Bridges presiding, heard testimony on Appellant's petition. At the hearing in Rankin County Chancery Court, Appellant argued, and presented evidence to prove, that she was denied adequate notice of the original procedings for Divorce; that inadequate notice thereof deprived her of due process as required by both Mississippi Constitution and Laws and the U.S. Constitution and Laws. She also

contended that the absence of any notice of the Amended pleading deprived her of due process. The Trial Court denied Appellant's Petition without stating the factual or legal reasoning therefore, and on June 2, 1980, entered a Decree dismissing the same for want of merit.

From the dismissal, Appellnt appealed to the Supreme Court of Mississippi. She asserted that the Chancery Court abused its discretion in denying Appellant's petition and in support thereof, made the same contentions and arguments as were presented to the Chancery Court. On March 25, 1981 the Supreme Court of Mississippi, without written or recorded opinion and without otherwise affording Appellant benefit of the Courts' reasoning, affirmed the Decree of Chancery Court.

On April 15, 1981 Appellant petitioned the Supreme Court of Mississippi to rehear the appeal. In her petition for rehearing, Appellant specifically argued that the use of Notice by publication in this instance failed to meet the standard of Notice required under the Fifth and Fourteenth Amendment due process clauses of the U.S. Constitution; that the failure to give additional Notice upon allowing the Amendment to the pleadings to state a new, separate, and distinct cause of action violates the requirements of Notice as guaranteed by Fifth and Fourteenth Amendment due process clauses to the U.S. Constitution, citing *Walker v. City of Hutchenson, Kansas*, 77 S.Ct. 200, 352 U.S. 112; *Mullane v. Central Hanover Bank and Trust Co.*, 70 S.Ct. 652, 339, U.S. 306; *Covey v. Town of Somers*, 76 S.Ct. 724, 351 U.S. 141. On May 6, 1981, the Supreme Court of Mississippi denied Appellants prayer for rehearing, again without written opinion, findings or conclusions.

There are no Courts of higher or Appellate Jurisdiction in the State of Mississippi to which Appellant may appeal.

From the March 25, 1981 judgment and the May 6th, 1981 denial of the petition for rehearing in the Mississippi Supreme Court, Appellant brings this appeal to review the judgment of that Court.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the particular rights threatened. Personal, in-hand service is the notice contemplated under Common Law Procedures. However states may through statute authorize substitute personal service to confer personal jurisdiction. Jurisdiction under such statutes, however, may be acquired only if (1) the statutes are validly enacted and prescribe a constitutional mode of substitute service, and (2) if the Plaintiff *fully* complies with their provisions. Leflar, *American Conflict of Law*, Section 21 (1968). Such statutes may authorize service by publication, but such statutes cannot nullify the basic right to be heard. *American Conflict of Law*, Supra.

The Courts have long held that notice by publication is not sufficient with respect to an individual whose name and address are known or are easily ascertainable. Cf. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The law is also generally clear that where a pending action is amended or changed to state a totally new cause of action, the defendant is entitled to notice and an opportunity to be heard on the new action prior to judgment. *St. Louis, San Francisco and Texas Ry. Co. v. Seale*, 229 U.S. 156, 161-162, 33 S.Ct. 651, 57 L.Ed. 1129 (1913). This appeal squarely raises the issue whether a failure of notice, both because of a form of attempted service which is not calculated, under all the circumtances, to apprise defendant of a pending action, and because of a judicial procedure which does not require notice of amended action, after taking evidence and prior to judgment make such judgment void ab initio.

(1) Statutory Service Requirements Are In Derogation Of Common Law Rules, And Must Be Strictly Construed And Exactly Complied With.

At common law, personal, in-hand service was required to invoke in personam jurisdiction. The states, however, may create statutes which do not require personal service. But jurisdiction can be predicated upon such statutes only if the statutes are validly enacted and prescribed a constitutional mode of service, and only if Plaintiff fully complies with their provisions. Leflar, *American Conflicts of Law*, Section 21 (1968). Statutes authorizing substitute service or publication may not nullify the basic right to be heard.

As stated in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, this Court has held:

> "Under the law permitting notice by publication, it is clear that many defendants lose their rights with something less than actual notice. Since such statutes are implemented in derogation of common law rights, they must be strictly construed and exactly complied with, service is invalid, and any ensuing default judgment is void ab initio."

Mississippi law permitted service of process in a divorce action on a domiciliary, even though that person was not found within the state. Section 1852 Mississippi code, 1942, Mississippi law also provided for service by publication on one not a resident of Mississippi. Section 1852 Mississippi code, 1942. But even if those statutes are constitutional, where there was no evidence that defendant had changed her Mississippi residence or domicile. and there was undisputed testimony that the parties separated within Mississippi, and that they conversed with each other,

both within Mississippi, up through the filing of the complaint, service on defendant by publication is strictly in compliance with the statute, and is thus a violation of due process.

Other state Supreme Courts have addressed this issue and have followed a rule in line with that of this Court. For instance, the Arkansas Supreme Court, in *Barksdale v. Barksdale*, 170 Ark. 288, 279, S.W.2d 789 (1926) Held:

> "If it was true, as Appellant alleged and his testimony tended to prove, that Appellant, before and at the time of the filing of the action, was a citizen and resident of Union County, Ark., then he had not been served with summons as the law provides and the rendition of a decree upon constructive service was a legal fraud practiced upon the court. Although the Appellee, in her answer to the motion, alleged that Appellant was a nonresident of the state at the time of the institution of the action and issuing of the warning order, nevertheless she did not introduce any testimony tending to support these allegations and to controvert the testimony of the Appellant."

279 S.W.2d at 791.

> "If it was indeed true as the Appellant alleged, and his testimony tended to prove, that Appellant, at the time of the institution of the action, was a citizen and resident of Union County, Ark., then it would neccessarily follow that the affidavit of the Appellee was false upon which the warning order was issued. If Appellant was a resident of Union County, Ark., at the time the affidavit for warning order was made, and at the time such order was issued, and if Appellant and his counsel did not know of the pendency of the action until on the very day the

> decree was rendered, at which time there were no papers on file in the cause, and if appellee's counsel proceeded to take the decree predicated upon alleged constructive service without restoring the papers, and giving Appellant's counsel an opportunity to answer, then, in legal effect, the entire proceedings were as if appellant had neither actual knowledge nor constructive notice thereof, and same were therefore null and void. Section 6238, O.M. Digest; *Grinstead v. Wilson*, 69 Ark. 587, 65 S.W. 108.
>
> In *Corney v. Corney*, 79 Ark. 289, 95 S.W. 135, 116 Am. St. Rep. 80, we held that, where a husband procured a divorce upon constructive service falsely alleging that he resided in the County of the venue, and that his wife was nonresident of the State, when both statements were false, and the wife, after the decree on the ground that it was procured by fraud, the court will vacate the decree by fraud, the Court will vacate the decree and dismiss the original complaint for want of jurisdiction."

279 S.W.2d at 792.

In *Wuchter v. Pizzutti*, 276 U.S. 13, 48 S.Ct. 259, 72 L.Ed 446 (1928), the constitutionality of service requirements in nonresident motorist statutes was contested. This Court held that the mode of service must make it reasonably probable that defendant would receive actual notice. The Court placed on Plaintiff the burden to investigate into such facts as would reveal defendant's actual address.

Thus, unless the statute for Mississippi, including the application thereof, requires due diligence in

ascertaining defendant's address, the statute does not prescribe a method of service reasonably calculated to give actual notice, and therefore does not meet the requirements of *Wuchter v. Pizzutti*, supra. Service by publication in a newspaper on a person domiciled in the Forum state is insufficient, at least if an obviously better method of service is available. Restatement of The Law of Judgments, Ch. 2, §6, P. 37 (1942). On the record of this case, a casual comment in one of their telephone conversations, or a letter addressed to Appellant's relatives or her last place of employment would have accorded Appellant infinitely more due process. Rather, publication was the only means of notice. No notice was sent to her last known address.

(2) Due Process Requires That Statute Be Interpreted As Requiring That Method Of Service Permitted Be Reasonably Calculated To Give Actual Notice And Opportunity To Be Heard.

Over fifty years ago, this Court, in *Mullane v. Central Hanover Bank & Trust Co.*, supra, stated the basic rule:

> When notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

More specifically, *Mullane*, held that notice by publication is not sufficent where the name and address of the party to be served are known or easily ascertainable. *Robinson v. Hanrahan*, 409 U.S. 38, 40, 93, S.Ct. 30, 31, 34, L.Ed. 47 (1972), citing *Covey v. Town of Sommers*, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956); *Schroeder v. New York*, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed2d 255 (1962); *Walker v. City of Hutchinson*, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed 2d 178 (1956), et al.

Hanrahan was itself a case very similar in some respects to the present one. There the state knew defendant's address, but that he was almost certain not to receive notice if mailed to his residence. Nevertheless a notice of proceedings against him was mailed to his residence. This Court there held that "it cannot be said that the state made any effort to provide notice which was reasonably calculated to apprise appellant..." 409 U.S. at 40, 93 S.Ct., at 31, 34 L.Ed., 2d, 47. The record in the instant case shows that the parties communicated regularly during their separation, but Appellant did not find out about the divorce proceedings until long after the divorce was granted.

The issues in Covey, supra, are also pretty much like the issues here presented. In Covey the notice satisfied state statutes. The notice here given seems to satisfy the Mississippi statues regarding Notice, at least as the Mississippi Court appears to have decided, but the statutory notice was simply improper under the circumstances and inadequate to afford the Appellant actual notice or notice reasonably calculated to inform the Appellant of the proceedings. This, coupled with the fact that the Appellant is subsequently summarily precluded from contesting the proceeding or the validity thereof, once she comes upon actual notice of the proceedings, serves to deprive the Appellant of property without opportunity to be heard and object, thus without due process of law, per *Mullane*, supra. The Court in Covey reasoned that had there been adequate and effective opportunity for the Appellant to contest the adequacy of the notice in those proceedings even after determination of rights and judgment, their decision might have been different. These two cases stand firmly for the proposition that the most reasonable notice under the circumstances is required in every case, regardless of what a statute allows. They also stand for the

proposition that adequacy of notice must be subject to review, where actual notice is not had, to determine if it is the most reasonable. If the notice given is not the most reasonable then the procedure may violate due process.

In *Walker v. City of Hutchenson*, 352, U.S. 114, 77 S.Ct. 200, (1956) the U.S. Supreme Court went further and held that where the Respondent was a resident of the State, and his name and whereabouts were known to the Plaintiff, newspaper publication of notice of proceedings against him alone did not measure up to the quality of Notice required as a prerequisite to fixing the rights of the parties by the due process clause of the Fourteenth Amendment. The decision was premised on the well known fact that it is common knowledge that "mere newspaper publication rarely informs a party of proceedings against him."

The Court in The *Walker* case pointed out its opinion in the *Mullane* case, supra, where they stressed the infirmities of notice by publication and emphasized the advantage of personal notice wherever possible. It went further to say that "in the present case, there seems to be no compelling or even persuasive reasons why such direct notice cannot be given." 77 S.Ct., at 202.

For more than a century, this Court has held that the central meaning of due process is clear; parties whose rights are to be affected are entitled to be heard; and in order to enjoy that right, they must first be notified. *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 L.Ed.2d 1983, 1984, 32 S.Ct. 556 (1972).

In this case there was neither actual nor substituted notice which complied with statutory provisions. If the statutory provisions were complied with, then the statute must be unconstitutional. No notice was sent to any where

appellant was reasonably likely to see it. No independant third party attempted to give notice, or made any averment of diligent efforts to effect service. The burden of proving diligence in serving notice certainly should fall upon appellee, and should increase where the evidence of record indicates actual contact between the parties at the time of publication, and more significantly, where Appellant was a domiciliary and a resident of the forum state.

(3) Where Ground For Divorce Is Changed After Default, A Valid Default Judgment Cannot Be Entered Based On The New Ground Unless Defendant Is Notified Of The Amendment And Given Opportunity To Be Heard.

Where the complaint is substantially amended after default by defendant, a valid default judgment cannot be entered on the amended pleadings without first properly serving the defaulting party with a copy of the Amended pleading and thereafter giving the defaulting party the opportunity to plead. It is error to proceed to judgment by default on an amended pleading where there is no evidence that notice or an opportunity to respond was accorded. *Chapman v. Barney*, 9 S.Ct. 426, 129 U.S. 677, 681, 32 L.Ed. 800 (1889). Here, in fact the evidence clearly, and without controversion, shows there was no effort to give notice to Appellant after the amendment of Appellee's complaint for divorce.

In *Chapman v. Barney*, the Court stated:

> Where there has been an appearance and no plea, or where, on account of amendments and changes of pleadings the declaration remains without answer, the Plaintiff may move for judgment for the want of a plea, as upon Nil dicit. But no such motion was made. Certainly a jury should not have been called,

> and verdict entered where no issue is joined. Unless for assessment of damages only. The Court erred in rendering Judgment thereon. 129 U.S. at 681.

In the *Chapman* case, the defendant had appeared and answered to the original pleadings. The record does not show whether he had actual knowledge of the amended pleading. For the Court here, the issue is the propriety of entry of judgment against a defendant for whom there is no evidence of notice or knowledge of the original action and where the record clearly shows there was no notice or effort by either Plaintiff or the Court, to notify defendant of the Amendments prior to judgment. Were defendant is not allowed to plead to material amendments of a cause of action, it is error to enter a judgment based on the amended cause of action. See *Philco Distributors, Inc. v. Herron*, 195 So.2d 473 (Miss. 1967); *Donnell v. Rigus Quarries*, 457 S.W.2d 249 (MO app. 1970); *Ford v. Superior Court for The County of Orange*, 34 Cal. app. 3d 388, 109 cal. Rptr. 884 (1973).

Where the amendment is of a formal or immaterial matter, there is no need to provide new service. The general rule applies to substantial amendment, such as the insertion of new causes of action, and in that context, it is without exception. Restatement of Judgments, Ch. 2, §8, Comment C. P. 489 (1942).

The allegation of a new ground for divorce during the taking of proof introduces a new and distinct cause of action. A new cause of action cannot be pleaded after the taking of proof without giving defendant notice thereof and an opportunity to plead further, *Bamberger v. Terry*, 103 U.S. 40, 43-44, 26 L.Ed. 317 (1880), and clearly an absent defendant cannot waive the right to object. See *Griffen v. Griffen*, 327 U.S. 22, 66 S.Ct. 556, 90 L.Ed. _____ (1946).

Griffin, supra, involved a proceeding where both parties had knowledge of the original action, had each appeared and argued extensively at various stages of the proceeding, yet at a later stage, the appealing party was not given notice of the specified action and thus no opportuntiy to interpose his defense or objection to that specific proceeding. The Court at 3227 U.S. 228 held;

> "Concededly the judgment was issued without actual notice to or appearance by Petitioner, and without any form of substitued service of process calculated to give him notice of the proceedings... Because of the omission, and to extent petitioner was thus deprived of an opportunity to raise defenses otherwise open to him under the law.... There was want of Judicial Due Process, and hence want of that jurisdiction over the persons of Petitioner's requisite to the rendition of a Judgment....against him *McDonald v. Maber*, 37 S.Ct. 343, 243 U.S. 90; *Webster v. Reid*, 11 how (U.S.) 437.....it is immaterial for present purposes, whether or not petitioner was a domiciled resident in N.Y., or either within or temporarily without the State, or a resident of some other jurisdiction. it is plain in any case, that a judgment... purporting to cut off all available defenses, could not be rendered on any theory of the States power over him, without some form of notice by personal of substituted service. *Wuchter v. Pizzutti*, 48 S.Ct. 258, 176, U.S. 13. Such notice cannot be dispensed with even in the case of judgments in Rem. with respect to property within the jurisdiction of the Court rendering the judgment. *Roller v. Holly*, 20 S.Ct. 410, 176 U.S. 398."

Therefore, a party in default is entitled to notice prior to judgment on a substantially and materially amended complaint. Restatement of Law judgments, Ch. 2 §8, supra.

All of the above is made more significant where original service was by publication, and defendant is a resident of the Forum State. There is nothing to put defendant on notice of a possible amendment. Such a sequence of events, if allowed to occur without check, might allow a Plaintiff to seek divorce only in an original pleading, then amend the same to seek divorce, child custody, alimony, to the defaulting party. Notice in such an instance would obviously be essential to Due Process.

More importantly, the Trial Court lacks jurisdiction over defendant as to the new cause of action. As far back as *Pennoyer v. Neff*, the Fourteenth Amendment to the constitution has been held to bar judgment where the Court lacks personal jurisdiction. 95 U.S. 714, 24 L.Ed. 565 (1878). Here there was no service, either proper or improper, and thus any proceedings after amendment were void; any adjudication resulting from the void proceedings are without binding effect or legal consequence, as if it never happened.

CONCLUSION

This appeal raises an issue of fundamental importance to our system of jurisprudence and our concept of Due Process. Since the adoption of the Fourteenth Amendment to the Constitution, this Court has scrutinized exercises of personal jurisdiction by State Courts, to ensure that they comport with Due Process guarantees. The state of Mississippi's highest Court has, on at least two ocassions, refused to analyze a serious allegation of due process deprivation. The result of the Trial Courts' decision leaves the State of Mississippi in conflict with the decisions of this Court and most other states. In light of the clear trend of cases in this Court and in most other jurisdictions, this case should be considered and reversed.

Respectfully submitted,

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KEARNEY LAW OFFICES
JULY 1981.

APPENDIX

Dora Lillian RUSSUM

v.

John Robert RUSSUM, Sr.

No. 52489.

Supreme Court of Mississippi.

March 25, 1981.

Rehearing Denied May 6, 1981.

Appeal from Chancery Court, Rankin County; Billy G. Bridges, Chancellor.

John L. Kearney, Pine Bluff, Ark., for appellant.

Jerry T. Johnston, Johnston, Adams & Younger, Brandon, for appellee.

Before PATTERSON, C.J., and SUGG and WALKER, JJ.

AFFIRMED.

IN THE SUPREME COURT OF MISSISSIPPI
NO. 52,489

DORA LILLIAN RUSSUM — APPELLANT

VS.

JOHN ROBERT RUSSUM — DEFENDANT

NOTICE OF APPEAL

Appellant, Dora Lillian Russum, appeals to the Supreme Court of the United States from the final Judgment of this court, entered May 6, 1981, affirming the Judgment of the Rankin County Chancery Court and denying Appellants Petition to set aside the Decree of Divorce between Appellant and the late John Russum.

This appeal is taken pursuant to 28 U.S.C.A. Section 12[illegible]

CERTIFICATE OF SERVICE

I, Jesse L. Kearney, Attorney for Appellant, do hereby certify that a copy of the foregoing Notice of Appeal has been served upon Appellee by placing a copy of the same in the United States Mail, postage prepaid to Jerry T. Johnson, 220 North Timber Street, Brandon, Mississippi, 39042 on this 8th day of May, 1981.

/s/ Jesse L. Kearney
Jesse L. Kearney
Attorney for Appellant

Motion to Dismiss or Affirm

Office-Supreme Court, U.S.
FILED
SEP 2 1981
ALEXANDER L. STEVAS,
CLERK

No. 81 - 292

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Dora Lillian Russum ..... *Appellant*

VS.

Estate of John R. Russum, Sr. ..... *Appellee*

ON APPEAL FROM THE
SUPREME COURT OF MISSISSIPPI

MOTION TO DISMISS

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MOTION TO DISMISS

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves to dismiss the appeal on the grounds (1) that the appeal does not raise a substantial federal question, (2) that the federal questions sought to be reviewed were not timely or properly raised in the state courts of Mississippi and were not expressly passed upon by those courts, and (3) that the judgment appealed from has adequate non-federal bases.

STATEMENT OF THE FACTS OF THE CASE

The "Statements Of The Facts Of The Case" presented by the appellant contains numerous inaccuracies which are reflected in the "Questions Presented By This Appeal" as framed by appellant in her jurisdictional statement.

1. Appellant misinforms this Court as to the manner and time in which the questions sought to be reviewed were raised. Appellant did not raise any federal due process claim in her "Petition To Set Aside And To Declare Void Final Decree Of Divorce" as inferred at page 8 of her jurisdictional statement. In her petition to the Chancery Court of Rankin County, Mississippi, she only alleged that the decree of divorce was void because no amended complaint had been filed charging habitual drunkenness and no process had been issued to the appellant on such amended complaint. (R. 17) (Record references are to Mississippi Supreme Court record.)

In her petition and in her proof to Rankin Chancery, Dora Russum did assert facts which could have been framed to present a federal due process claim, but she stated no federal claim to Rankin Chancery. Her assertion at pages 8-9 of her jurisdictional statement that she argued in Rankin Chancery that she had been denied due process under the U.S. Constitution is not supported by the record. Only state law claims were presented to Rankin Chancery.

The questions sought to be presented to this Court were not raised in appellant's assignments of error to the Mississippi Supreme Court, either. It was only after the appellant lost her appeal that, in her petition for rehearing, she first raised the federal constitutional questions sought to be presented here. In denying the petition for rehearing, the Mississippi Supreme Court wrote no opinion so did not expressly decide those questions.

2. At page 7 of her jurisdictional statement, the appellant presents as fact her contention that, when John Russum filed his action for divorce and published process, he knew where she was and that she was domiciled in the State of Mississippi. In framing her "Questions Presented By This Appeal", the

appellant claims appellee would have known her whereabouts had he exercised diligent search and inquiry. At page 15 of her jurisdictional statement, appellant implies that she and her husband had conversed while the divorce proceedings were pending and that he knew her relatives' addresses and her last place of employment. None of these contentions are supported by the record.

The record establishes that John Robert Russum, Sr., filed a bill of complaint for divorce against Dora Lillian Russum in Rankin County Chancery Court on 28 December, 1963. (R. 10) In his complaint, he alleged that "defendant is a non-resident of Mississippi, or cannot be found therein after diligent search and inquiry, and that her post office address and street address are unknown after diligent search and inquiry." (R. 8)

John Russum further alleged that he was entitled to a divorce from his wife on the statutory ground of habitual cruel and inhuman treatment, and in the course of specifying the facts supporting his claim alleged that "for the past year and one-half, the defendant has drunk intoxicating liquor to excess. That she has stayed drunk for a period of two to three days at a time on numerous occasions." (R. 8)

The relief demanded by John Russum was a divorce and custody of the parties' children. (R. 9) Process was had by publication meeting the requirements of state law. (R. 11)

The divorce complaint as found in the record shows that the habitual cruel and inhuman treatment claims were deleted by amendment, and a claim for divorce on the ground of habitual drunkenness substituted. (R. 8-9)

On 26 February 1964, a final decree of divorce was entered in which the chancellor found "that service of process by publication is [sic] provided for by statute has been had on the defendant" and awarded John Russum a divorce on the ground of habitual drunkenness and custody of the parties' children. (R. 12-13) Nowhere in the record of the divorce proceedings was there any entry of appearance by Dora

Russum. She first entered the proceedings with the filing of her petition in October, 1979, more than fifteen years after the divorce decree had been entered.

In her "Petition to Set Aside And To Declare Void Final Decree of Divorce" filed in Rankin County Chancery Court on or about 24 October 1979, after John Russum's death, Dora Russum alleged that John Russum had known her whereabouts in Mississippi when he had filed for divorce and alleged that he could not find her, and that he had failed to make diligent search and inquiry to determine her whereabouts. (R. 15-16) The executor of John Russum's estate in his answer denied these factual allegations. (R. 19)

At the hearing on her petition, Dora Russum's sole evidence to support her allegations was her testimony that she had talked on the telephone with John Russum on Christmas Day, 1963 from her aunt's home in Satartia, Mississippi. (R. 62,80) Later that same day, she had left her aunt's home and gone to live with a sister in Redwood, Mississippi, with whom she stayed until after the divorce proceedings were completed. (R. 61) On the other hand, one of her supporting witnesses, her half-brother, Benjamin Thomas King, admitted that Dora Russum "moved around a great deal" during late 1963 and early 1964. (R. 101)

There was no testimony whatsoever as to the matters discussed in the purported Christmas Day 1963 phone call. It was not shown that Dora Russum advised John Russum of her whereabouts. There is no indication that her whereabouts were even a topic of discussion in the phone conversation. Nowhere in the record made in Rankin Chancery Court is there any proof that John Russum actually knew his estranged wife's whereabouts or that he could have discovered the same by diligent search and inquiry. There was no proof that she had a phone listed in her name or any residential address in her own name.

There was no testimony that John Russum even knew where any of Dora's relatives lived, much less who they were. There was no testimony that Dora Russum had even held a job, much

less any testimony that John Russum knew what her job had been and there was no testimony whatsoever that John and Dora Russum had any communication whatsoever between Christmas Day 1963, which was a few days before John Russum filed his divorce complaint, and 26 February 1964, the date the divorce decree was rendered. There was testimony that they communicated following the separation, but none of this proof limited those communications to the crucial period beginning 28 December 1963 and ending 26 February 1964.

In her summary statement of the grounds on which the jurisdiction of this Court is invoked (p. 2 of her jurisdictional statement), appellant alleges that she and John Russum were in frequent contact with each other by telephone, before and during the pendency of the divorce action. The record does not support this contention.

The Chancellor who had heard the divorce case on 26 February 1964, offered his recollections at the hearing on appellant's petition. He testified that it was his practice in this case and all other cases in which process was by publication to "ascertain with absolute certainty that diligent search and inquiry had, in fact, been made."(R. 105-106) In this case, he was "absolutely" satisfied that there had been diligent search and inquiry as alleged in the complaint, based on testimony he believed to be credible after hearing and observing the demeanor of the witnesses in support. (R. 106)

With regard to the amendment, the Chancellor stated that, after hearing testimony, he had asked that the amendment be made because, although he felt that a cause for divorce had possibly been established on both the grounds of habitual cruel and inhuman treatment and habitual drunkenness, he felt that the burden of proof had been more completely met as to habitual drunkenness. (R. 107)

3. Finally, appellant misinforms the Court as to what the Mississippi Supreme Court decided.

There is no support in the record for the factual underpinning for the second question appellant presents in her appeal, in which she contends that the Mississippi Supreme Court decided that process by publication alone is sufficient in a case in which the plaintiff knows the defendant's residence or could have discovered the same by diligent search and inquiry. The Mississippi Supreme Court made no such finding, either expressly or by implication.

ARGUMENT

1. The Appeal Raises No Substantial Federal Question.

a. The first question presented, in which the appellant contends that due process is denied when further process is not issued against a defendant already in default, following the amendment of a divorce complaint to state another ground for divorce, is frivilous.

In this case, John Russum sued Dora Russum for divorce, had process on her by publication, and she entered no appearance. At the hearing on the divorce, with Mrs. Russum still in default, the chancellor decided that the ground for divorce should be changed from habitual cruel and inhuman treatment to habitual drunkenness. The amendment was made, there was no further process on Mrs. Russum, and a divorce was granted on habitual drunkenness. The relief granted on the habitual drunkenness claim was the identical relief that had been demanded under the habitual cruel and inhuman treatment claim.

Mrs. Russum claims in this Court that she was entitled to additional notice and process on the amendment, even though she had not responded to the notice and process afforded her on the original complaint. She cites no authority for this position in her jurisdictional statement at pages 18-21. Every one of her authorities concern cases in which the defendant had made an appearance.

The Mississippi statutes (Jurisdictional Statement pages 3-4) are in accord with the principles stated in the cases cited by appellant. Where the defendant has answered or made an appearance, notice of the amendment is required.

Those authorities are not applicable here, where the defendant had never entered an appearance in response to the original complaint. Nowhere does the appellant explain to this Court how additional process would have aided the appellant in the light of the fact that she was already in default on the original complaint.

The error, if any, from failure to issue new process on the amendment was harmless. Habitual cruel and inhuman treatment and habitual drunkenness, while separate and distinct statutory grounds for divorce in Mississippi (Jurisdictional Statement p. 6), are nonetheless similar. And although the original complaint alleged habitual cruel and inhuman treatment and not habitual drunkenness, the original complaint did set forth ample factual allegations to advise Mrs. Russum that numerous episodes of drunkenness supported John Russum's demand for divorce. (R. 8) Little purpose would have been served by notifying Mrs. Russum that those factual allegations would be used to support a claim of habitual drunkenness as well as the claim of habitual cruel and inhuman treatment.

The pre-eminent Mississippi authority on divorce, **Amis on Divorce and Separation in Mississippi**, describes the close relationship between the habitual cruel and inhuman treatment and the habitual drunkenness divorce grounds, observing that habitual drunkenness as a divorce ground "is closely akin to that of cruelty because drunkenness was, and still is, so often a concomitant of cruelty." **Amis** at §3.12(2).

Although drunkenness per se is not cruelty, because the conduct does not necessarily become cruel, it can be said to be a lesser included offense within habitual cruel and inhuman treatment. **Amis** notes that frequent intoxication has been recognized by the Mississippi Supreme Court as part of a habitual and inhuman treatment cause of action (**Amis** at §3.14, Fn. 74, citing *Brock vs. Brock*, 205 Miss.366, 38 So.2d 321 (1949). **Amis** submits that habitual drunkenness becomes a cause of action to the extent that the wrongdoer is unreasonable, inconsiderate and reckless in his conduct and becomes a menace to the peace and safety of his spouse, or is so overcome with drink as to become unable to discharge the usual martial duties or to perform useful work or business. **Amis** §3.12(3).

Inasmuch as John Russum sought the same relief on the habitual drunkenness ground as he did on the habitual cruel and inhuman treatment ground, and inasmuch as the two

grounds are so closely related and John Russum, in his original complaint, advised Mrs. Russum that her abuse of alcohol was part of his cause of action, it is frivilous for Dora Russum to present as a serious constitutional question for review by this Court, that she was denied due process by the failure of the Rankin County Chancery Court to issue new process on a bill of complaint as amended to specifically state a cause of action for a cause of divorce on the ground of habitual drunkenness.

b. The appellant's contention that this appeal presents the question of whether due process permits process by publication when plaintiff knows or with reasonable diligence could have known the whereabouts of the defendant, is spurious.

The issue as presented by the appellant has been decided in the appellant's favor. Where the defendant's name and address are known or easily ascertainable, notice by publication will not suffice. *Robinson v. Hanrahan*, 409 U.S. 38 (1972).

The facts of this case do not present the question suggested by the appellant. As appellee's Statement of the Facts of the Case with its record references shows, there was no proof presented to the Rankin County Chancery Court that John Russum knew Dora Russum's whereabouts or could, with reasonable diligence, have learned of her whereabouts during the pendency of his divorce proceedings against her in late 1963 and early 1964. The facts are just the opposite.

The statute under which process by publication was had (Jurisdictional Statement pages 5-6) requires diligent search and inquiry before such process may be had in lieu of personal service, and the Chancellor was "absolutely" satisfied himself that John Russum had met the statutory requirement of diligent search and inquiry. In the light of the fact that the only proof the appellant introduced to overturn the Chancellor's finding was her assertion that she had spoken with her husband on the phone a few days before he filed his divorce complaint, her contention that the courts of Mississippi have sanctioned a clear violation of state statute as well as the holding of *Robinson*, **supra**, is without support.

2. The Federal Questions To Be Reviewed Were Not Timely or Properly Raised and Were Not Expressly Passed On By the Mississippi Courts.

Under Mississippi procedural rules, the appellant was required to raise her constitutional questions in Rankin County Chancery Court in order to have them reviewed on appeal. *State ex rel. Carr vs. Cabana Terrace, Inc.*, 247 Miss.26, 153 So.2d 257 (1963). *Stewart vs. City of Pascagoula*, 206 So.2d 325 (Miss.1968). This the appellant did not do. She couched her chancery court claims solely in terms of fraud and insufficiency of notice under state law.

On her initial appeal to the Mississippi Supreme Court, she assigned as her whole ground of appeal: "The Chancery Court abused its discretion in refusing to set aside the decree of divorce." No federal issue whatsoever was presented to the Mississippi Supreme Court until on 17 April 1981, when appellant filed her petition for rehearing. The contentions made in her jurisdictional statement that the Federal questions were presented earlier are without support in the record.

The petition for rehearing was denied without an opinion expressly passing on the late-presented federal claims (Jurisdictional Statement, p. 23).

Inasmuch as the federal constitutional questions raised here were not presented in accordance with Mississippi procedural requirements and inasmuch as the Mississippi Supreme Court was completely silent on the federal questions raised on petition for rehearing, this Court should decline to exercise jurisdiction. *Mutual Life Insurance Company vs. McGrew*, 188 US 291, 308 (1903).

3. Adequate Non-Federal Grounds Support the Decisions of Mississippi Supreme Court and the Rankin County Chancery Court.

On this record, it is clear that the decisions of the trial court and the Mississippi Supreme Court may have been based upon both application of the equitable doctrine of laches, and upon

factual findings that Dora Russum simply had not sustained the contentions necessary to support her claims. There being no written decisions to explain the rationale of either the trial court or the Mississippi Supreme Court, the appropriate presumption is that, adequate non-federal grounds being present, jurisdiction should be declined by this Court. *Lynch vs. New York ex rel. Pierson*, 293 US 52, 54-55 (1934). In any event, it is clear that the appellant has not sustained her burden of demonstrating that the state grounds cannot account for the decisions of the Chancery and Supreme Courts below. *Durley vs. Mayo*, 351 U.S. 277, 281 (1956).

CONCLUSION

It is respectfully submitted that this Court should dismiss the appeal of Dora Russum because on the record there is no substantial federal question raised, the federal questions the appellant seeks to raise in this Court were not presented in the Mississippi courts in accordance with Mississippi procedural requirements, and the decisions of the Rankin County Chancery Court and the Mississippi Supreme Court rest on adequate non-federal grounds. The jurisdictional statement filed by the appellant assumes facts that are not in the record and assumes dispositions not rendered by the courts below. The decision of the Mississippi Supreme Court should be allowed to stand so that the administration of John R. Russum, Sr.'s estate can proceed without further interruption.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charles H. Ramberg, attorney for appellee, do hereby certify that a copy of the foregoing motion to dismiss has been served upon the appellant by depositing three copies of the same in the United States mail, with first class postage prepaid, to Jesse L. Kearney, Esq., attorney of record for the appellant, at his post office address, namely, Post Office Box 8276, Pine Bluff, Arkansas 71611, on this 31st day of August, 1981.

CHARLES H. RAMBERG
ATTORNEY FOR APPELLEE